

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOROTHY PUGH)	
Claimant)	
VS.)	
)	
AMERICAN INSULATED WIRE)	Docket No. 241,426
Respondent)	
AND)	
)	
RELIANCE NATIONAL INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the June 7, 2001, Award of Administrative Law Judge Jon L. Frobish. Claimant was denied benefits after the Administrative Law Judge determined that claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment and further had failed to provide timely notice of the accident. The Board held oral argument on December 4, 2001.

APPEARANCES

Claimant appeared by her attorney, Patrick C. Smith of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Stephen J. Jones of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. However, with regard to stipulation No. 2 in the Award, it is acknowledged that claimant's base wage was \$374, but this computes to a \$9.35 per hour wage rather than the \$9.55 shown in the Award. This typographical error will be corrected in the award of the Board. The parties did stipulate to a base wage of \$374, plus overtime of \$96.97, plus fringe benefits of \$70 per week, for a total average weekly wage of \$540.97.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment on the dates alleged?
- (2) Did claimant provide timely notice of accident as required by K.S.A. 44-520 (Furse 1993)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for respondent, making wire, in November 1996. Claimant's job involved grasping and pulling wire. Beginning in October 1997, claimant began experiencing symptoms in her arms and wrists. Claimant first sought treatment with her family doctor, Dr. J. Christensen, on October 10, 1997. At first, claimant alleged symptoms in her right upper extremity only. By February 1998, claimant was alleging bilateral symptoms. She was provided braces to wear. Claimant testified that she advised her supervisor, Antonio Chaves, of her ongoing problems and that she regularly wore the braces at work. Claimant further testified that she informed Mr. Chaves of a work-related connection between her ongoing carpal tunnel syndrome and her employment. Claimant continued treatment with Dr. Christensen through her termination on March 15, 1998.

Claimant testified that, while working for respondent, she was on the safety committee and was aware of carpal tunnel syndrome and the reporting obligations of employees who suffered injuries while at work. Claimant, during October, while receiving treatment with Dr. Christensen for the carpal tunnel syndrome, also suffered a shoulder injury. Claimant prepared a written report of her shoulder injury. Claimant acknowledged, during cross-examination, that a written report was required with every injury suffered on the job. Claimant admitted she should have prepared a written report for her alleged carpal tunnel syndrome, but did not.

Claimant was scheduled for EMG nerve conduction studies on March 17, 1998, two days after her termination. Claimant did not follow through with the ordered tests. Claimant failed to seek additional medical treatment for the carpal tunnel syndrome until October 12, 1999.

After claimant left her employment with respondent, she collected unemployment for a period of time. She then obtained a job with Rosie's Café in South Coffeyville where she worked as a waitress until suffering injuries in a car wreck in March 1999. Claimant suffered substantial injuries to her face and had several of her teeth knocked out as a result of that accident. After and as a result of the accident, claimant was terminated at Rosie's. Apparently, her facial features were no longer acceptable. She had been making

\$250 to \$300 a week while working at Rosie's. Claimant and her daughter jointly began a newspaper route three months after she started her employment with Rosie's.

Claimant began treatment with J. Mark Melhorn, M.D., for her carpal tunnel syndrome on October 12, 1999. After a brief period of conservative treatment, claimant underwent carpal tunnel surgery on the right side on December 10, 1999, and on the left side on December 28, 1999. Claimant was released by Dr. Melhorn to modified light duty after the surgery. Claimant's symptoms continued to improve. Dr. Melhorn last examined her on February 22, 2000, finding that claimant was stable, although she did continue to improve slightly.

Claimant was returned to work with medium level work restrictions, including a maximum lift of 50 pounds, 25-pound frequent lift restriction and task rotation. Dr. Melhorn assessed claimant a 5.3 percent impairment to each upper extremity which combined to a 6.2 percent impairment to the body as a whole for her carpal tunnel syndrome. Dr. Melhorn was provided a task list showing the tasks claimant had performed during the 15 years preceding her accident. That task list, prepared by Karen Terrill, provided specific time limits on certain of the activities. After reviewing the tasks, Dr. Melhorn testified that claimant could perform all of the activities contained on that task list.

Claimant was examined at her attorney's request by Edward J. Prostic, M.D., board certified orthopedic surgeon, on July 18, 2000. Dr. Prostic confirmed the diagnosis of bilateral carpal tunnel syndrome. He assessed claimant a 20 percent permanent partial impairment to each upper extremity which combined to a 23 percent whole person impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He restricted claimant from repetitive forceful gripping with either hand. He was provided a list of the tasks performed by claimant during the 15 years preceding her accident. In reviewing the tasks, Dr. Prostic opined claimant was incapable of performing seven of twenty-two tasks for a 32 percent loss of task performing abilities. Dr. Prostic stated that the repetitious forceful activities performed by claimant during her employment with respondent caused claimant's bilateral carpal tunnel syndrome.

The Administrative Law Judge found claimant had failed to prove accidental injury arising out of and in the course of her employment. In the Award, the Administrative Law Judge stated "[u]nfortunately there is no testimony and records from Dr. Christensen to support this assertion."

This commentary on the record by the Administrative Law Judge is incorrect. Exhibit 3 to Dr. Melhorn's deposition, which was placed into evidence by the attorney for respondent without objection, contained the records of Dr. Christensen. In fact, the attorneys, during the deposition of Dr. Melhorn, discussed the records of Dr. Christensen. Those records show that claimant had bilateral upper extremity complaints contemporaneous with her employment with respondent.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. The Appeals Board finds, based upon the medical reports of Dr. Christensen and the testimony of claimant, that claimant has proven she suffered accidental injury arising out of and in the course of her employment with respondent. The Award of the Administrative Law Judge in this regard is reversed.

Claimant contends she discussed her ongoing symptoms with Antonio Chaves, her supervisor. Mr. Chaves disputed claimant's testimony. Mr. Chaves testified that not only was he not aware that claimant was having ongoing work-related problems, he was also unaware that claimant was being provided medical care. While Mr. Chaves did acknowledge he observed claimant wearing a brace at work on occasion, he testified that, when claimant was asked about the brace, she stated the problems were related to her prior work as a waitress when she had to carry trays back and forth. Claimant, at no time, advised Mr. Chaves that her upper extremity problems were related to her employment with respondent.

The Board finds it damaging that claimant, even though a member of the safety committee, failed to provide a written injury report to respondent regarding her ongoing carpal tunnel complaints. Claimant's symptoms were occurring at the same time she reported a shoulder injury in October 1997. While claimant submitted a written report on the shoulder injury, she never submitted a report to respondent for the carpal tunnel syndrome.

K.S.A. 44-520 (Furse 1993) obligates that a claimant provide notice to respondent of an accidental injury stating the time and place and particulars thereof within 10 days of the date of accident. Actual knowledge of the accident by the employer negates the responsibility of the claimant to provide this notice.

The Appeals Board finds claimant failed to provide notice of her accident in a timely fashion. There is a direct conflict between claimant's allegations of what she told Mr. Chaves and what Mr. Chaves recalls. The Appeals Board finds claimant's failure to submit a written report to be significant, especially from one who, as a member of the safety committee, was fully aware of the obligation to provide a written report of any accident to the employer.

Additionally, claimant, once terminated, ceased all medical treatment for her carpal tunnel syndrome until October 1999. Having been involved with workers' compensation injuries, claimant should have been aware that medical treatment was available through the workers' compensation system. Yet, even though claimant was scheduled for nerve conduction studies two days after her termination, she failed to attend that medical examination, failed to seek medical treatment from respondent and failed to pursue any additional medical treatment for over 19 months after her termination.

Finally, during the termination interview, claimant failed to mention any problems associated with her bilateral upper extremities. Claimant's comments to Lori Larkin, the human resources manager for respondent, at the time of her termination dealt only with the termination. Ms. Larkin testified she was unaware of claimant's upper extremity symptoms until January 1999, when she received notice of claimant's workers' compensation claim.

The Appeals Board finds that claimant failed to provide timely notice of her accidental injury which occurred through her last date of employment, March 15, 1998. The denial of benefits contained in the Award is, therefore, affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated June 7, 2001, should be, and is hereby, reversed with regard to whether claimant suffered accidental injury arising out of and in the course of her employment, but is affirmed with regard to claimant's failure to provide timely notice of accident pursuant to K.S.A. 44-520 (Furse 1993). The denial of benefits is, therefore, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority and find claimant's testimony credible and persuasive, especially in light of the information contained in Dr. Christensen's medical

notes. Accordingly, I conclude that claimant provided respondent with timely notice of the injury to her upper extremities.

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director